Causa contractus

Herausgegeben von
GREGOR ALBERS,
FRANCESCO PAOLO PATTI
und DOROTHÉE PERROUIN-VERBE

Max-Planck-Institut
für ausländisches und internationales
Privatrecht

Beiträge zum ausländischen
und internationalen Privatrecht

Mohr Siebeck

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137

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Direktoren:

Holger Fleischer, Ralf Michaels und Reinhard Zimmermann

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Auf der Suche nach den Bedingungen
der Wirksamkeit des vertraglichen Willens

Alla ricerca delle condizioni di efficacia
della volontà contrattuale

À la recherche des conditions de l'efficacité
de la volonté contractuelle

Edited by

Gregor Albers, Francesco Paolo Patti
and Dorothée Perrouin-Verbe

Mohr Siebeck

Gregor Albers is assistant professor (Akademischer Rat) at the Institute for Roman Law and Comparative Legal History at the University of Bonn.

Francesco Paolo Patti is associate professor at the University Bocconi of Milan.

Dorothée Perrouin-Verbe is a PhD candidate at the University of Paris II-Panthéon-Assas and teaches at CY Cergy Paris Université.

ISBN 978-3-16-158244-8 / eISBN 978-3-16-158245-5
DOI 10.1628/978-3-16-158245-5

ISSN 0340-6709 / eISSN 2568-6577
(Beiträge zum ausländischen und internationalen Privatrecht)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available on the Internet at *http://dnb.dnb.de*.

The book was printed on non-aging paper by Gulde-Druck in Tübingen, and bound by Großbuchbinderei Spinner in Ottersweier.

Printed in Germany.

Preface

The foundations of contract law are nowadays rarely discussed in continental Europe. However, European legal tradition provides a distinct focal point for such discussion: the notion of *causa*; a term used both to identify a contract's underlying purpose and to address the reasons for its enforcement.

The doctrine of causa can be traced back to medieval Roman law scholars. Informed by Aristotle's theory of causes, they focused on *causa finalis* and insisted that a contract, as a form of human action, had to be described with regard to the aims it pursues. While early modern natural lawyers took a narrower view on the will of the parties and focused on a contract's content, causa persisted. With the help of Domat and Pothier, it made its way into the Code Napoléon: under article 1108, a valid contract required *une cause licite dans l'obligation*. From the French archetype, *causa* spread into all the codes modelled thereafter. In the 20th century, Emilio Betti defined *causa* as the economic and social function of a contract (*funzione economico-sociale del negozio*). This understanding facilitated the integration of the notion in Italy's 1942 Codice civile, as it made it possible to evaluate private conduct by its social utility. Ever since the national codifications entered into force, jurisprudence has not ceased to develop new interpretations of *causa*. The notion's continuing appeal is attested by the fact that in 2017 *causa* was implemented as a necessary element of contract in the Principles of Latin American Contract Law.

For the last two hundred years, the notion of *causa* of contract has faced increasingly strong headwinds. The French provisions provoked a major debate in 19th century German jurisprudence, a debate which ultimately resulted in their rejection and a strong commitment not to accept any prerequisite for the creation of legal effects other than the agreement of capable parties. However, it is hard not to look for reasons: Although German law explicitly permits a contract to be detached from its cause (*abstraktes Versprechen*), the obligation created by such a contract can be the object of a restitutionary claim based on the doctrine of unjust enrichment. The test applied to determine whether an enrichment is unjust asks – of all things – whether or not it is based on a sufficient cause (*Rechtsgrund*). However, the apparent refusal to adopt *causa contractus* in Germany has contributed to its lack of success in projects for a common European law of contracts. An even more decisive factor for that failure might have been that *causa* is alien to the English common law (at least if one fails to recognise it in the element of *consideration*, which, in itself, has been the object of strong criticism for about

the same period of time *causa* has been under fire). Swayed by a perceived international trend against *causa* and weary of the endless debate on its meaning, France herself, when reforming her law of obligations in 2016, decided to dispense with the word *cause* in the new code. Whether the notion has perished with the word is a matter of debate. Not all countries are affected by these developments, though. In Italian case law, the concept is widely used to facilitate the application of different doctrines that require a precise scrutiny of the actual contractual purpose (*causa concreta*).

Against the background of these developments, it is remarkable that common law scholars in North America – notorious for their scepticism towards legal doctrine – have shown a growing interest in the theoretical foundations of contract law. They seek to align the results of their philosophical reasoning about contract with existing contract law doctrine. The apparent need for contract theory raises the question whether European jurists, to open their door into that realm, should not rather hold on to the key provided by the tradition of *causa*.

To revive the discourse of the *ius commune*, this book proposes to combine legal history and comparative law. Its first part portrays the development of the notions of *causa*, *cause*, *Voraussetzung*, *Geschäftsgrundlage* and consideration. Across time and space, these notions have served two purposes: to determine the legal validity of a contractual agreement and to allow for an adaption or cancellation of its legal effects due to a supervening change of circumstances. The second part of the book examines how these two issues are addressed by different legal systems, even if not all those systems frame the answers in terms of *causa*. Individual reports cover ancient Roman law and the French, German, Italian and English legal systems. We hope that the integration of both a doctrinal and a functional approach will allow for a clear view on the doctrinal and political question at hand: Do we still need *causa* in European private law? The future of *cause* is explored in the third and last part of the book. For a summary of the different sections, we invite the reader to consult the English-language introductory chapters. A further explanation of the book's outline (as well as an attempt at justification) is given in the very first chapter.

This book grew out of a series of three conferences held at *Villa Vigoni* (Menaggio) between 2016 and 2018.[1] As *Trilaterale Forschungskonferenzen*, they were funded by the joint efforts of *Villa Vigoni*, the *Deutsche Forschungsgemeinschaft* and the *Maison des Sciences de l'Homme*. We are very grateful for this unique opportunity for encounter and exchange. Personally, we are greatly indebted to Professor Emanuelle Chevreau, Professor Tommaso dalla Massara and Professor Martin Schermaier, who did not hesitate a moment to push forward a project

[1] For a report on the first meeting (November 28 - December 2, 2016) see Martina D'Onofrio, ZRG RA 134 (2017) 709-711 (in German); Marta Beghini, QLSD 2017, 482-484 (in Italian). On the second meeting (September 18-21, 2017) see D'Onofrio, ZEuP 2018, 478-420 (in German) and Index 46 (2018) 817-821 (in Italian). On the third meeting (September 19-22, 2018) see Marie Rögels, ZEuP 2019, 416-419 (in German).

conceived by younger scholars, to carry the weight of responsibility for the conferences and to enrich them with substantial contributions.

This publication has been made possible by the Max Planck Institute for Comparative and International Private Law (MPI) in Hamburg. We are grateful to Professor Reinhard Zimmermann for supporting the project over the years and for the trust he and the other editors have placed in us when accepting the volume for this series.

Many hands – and minds – have contributed to the editing of the book. The main part of the work has been done by the editorial office of the MPI under the direction of Dr Christian Eckl. Our thanks go to Janina Jentz for her diligence and patience and to Anja Rosenthal for the careful layout.

Several assistants at the MPI and at the Institute for Roman Law and Comparative Legal History in Bonn have helped with various tasks, especially proofreading the articles and redacting the indexes. Special thanks go to Jolanda Müller (Bonn) and Michael Friedman (MPI) for drafting translations and reviewing texts written in English.

Nearly all contributions to the book were finished by the beginning of 2020. In the meantime, a pandemic has entered and still continues to dominate our lives. Although it is scarcely mentioned in the book, readers might find that the pandemic sheds a light of topicality on some of the arguments brought forward on the following pages: Reflecting on the relationship between a contract, its circumstances and the purposes of the parties, contract law scholarship might be able to provide guidance also for cases that some might consider unprecedented.

Gregor Albers, Francesco Paolo Patti, Dorothée Perrouin-Verbe
Bonn, Milan, Paris
7 February 2022

Contents

II. Conclusion of Contract

III. Unexpected Circumstances

IV. Future of *causa*

Abbreviations

a.	articulus/articuli
a. a. O.	am angegebenen Ort
AC	Law Reports, Appeal Cases
Acc. Naz. Linc.	Accademia Nazionale dei Lincei
AcP	Archiv für die civilistische Praxis
AD/Appellate Div. Rep.	Appellate Division Reports (South Africa, 1919–1946)
Ad. & El.	Adolphus & Ellis' Queen's Bench Reports
AG	Amtsgericht
AJAH	American Journal of Ancient History
al.	alinéa
Aleyn	Aleyn's Reports, King's Bench
All ER	All England Law Reports
All ER (Comm)	All England Law Reports (Commercial Cases)
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Anm.	Anmerkung
Ann. Fac. giur. Un. Mac.	Annuali della Facoltà giuridica dell'Università di Macerata
ANRW	Aufstieg und Niedergang der römischen Welt
APD	Archives de philosophie du droit
App.	Corte d'appello
App. Cas.	Law Reports, Appeal Cases (2nd Series)
Arch. civ.	Archivio civile
Arch. locazioni	Archivio delle locazioni, del condominio e dell'immobiliare
Arch. giur. circol. e sinistri	Archivio giuridico della circolazione e dei sinistri stradali
arg.	argumentum
art./Art.	articulus/article/Artikel/articolo
artt.	articles/articoli
Ass. plén.	Assemblée plénière de la Cour de cassation
AUPA	Annali del Seminario giuridico della Università di Palermo
Aufl.	Auflage
av.	avant
B & C	Barnewall & Cresswell's King's Bench Reports
B. & S.	Best & Smith's Queen's Bench Reports
Banca, borsa tit. cred.	Banca, borsa e titoli di credito
BeckOK	Beck'scher Online-Kommentar
Belg. Jud.	Belgique Judiciaire
BGB	Bürgerliches Gesetzbuch (aktuelle Fassung)
BGB 1900	Bürgerliches Gesetzbuch in der zum 1.1.1900 in Kraft getretenen Fassung

BGB 2002	Bürgerliches Gesetzbuch in der ab dem 1.1.2002 geltenden Neufassung
BGBl.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
Bibl. jurisconsult. publ.	Bibliothèque du jurisconsulte et du publiciste
BIDR	Bullettino dell'Istituto di diritto romano «Vittorio Scialoja»
BMJ	Bundesministerium der Justiz
BRD	Bundesrepublik Deutschland
BR-Drs.	Bundesratsdrucksache
Brown Parl. Cas.	J. Brown's Cases in Parliament
BT-Drs.	Bundestagsdrucksache
Bull. civ.	Bulletin civil de la Cour de cassation
Burr.	Burrow's King's Bench Reports tempore Mansfield
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BVerwG	Bundesverwaltungsgericht
bzw.	beziehungsweise
C.	Causa/Codex
c.	canon/canones
c. c.	Codice civile
C. I. L.	Corpus Inscriptionum Latinarum
C. L. C.	Commercial Law Cases
CA	Court of Appeal
Cambridge L. J.	Cambridge Law Journal
Camp.	Campbell's Nisi Prius Cases
cap.	caput/capita
Cape Supreme Court Rep.	Cape Supreme Court Reports (South Africa, 1880–1910)
Cass.	Cour de cassation/Corte di Cassazione
CCC	Contrats concurrence consommation
CESL	Common European Sales Law
Cf.	confer
Cfr.	confronta
Ch	Law Reports, Chancery Division (3rd Series)
ch.	chapter
Civ. (1ère, 2ème , 3ème)	Chambre civile de la Cour de cassation (première, deuxième, troisième)
CLR	Commonwealth Law Reports (Australia)
Co. Rep.	Coke's King's Bench Reports
Col. L. Rev.	Columbia Law Review
Com.	Chambre commerciale de la Cour de cassation
Contratti	i Contratti. Bimestrale di dottrina, giurisprudenza e pratiche contrattuali
Contratto e impr.	Contratto e impresa
Contratto e impr. Europa	Contratto e impresa Europa
Corriere giur.	Il Corriere giuridico. Mensile di giurisprudenza civile, legislazione e opinioni
Cowp.	Cowper's King's Bench Reports
cpv.	capoverso

D	Recueil Dalloz
D.	Digesta
d. h.	das heißt
Danno e resp.	Danno e responsabilità
DCFR	Draft Common Frame of Reference
DDR	Deutsche Demokratische Republik
Defrénois	Répertoire Defrénois
dens.	denselben
ders.	derselbe
DH	Recueil hebdomadaire de jurisprudence Dalloz (avant 1941)
DHA	Dialogues d'Histoire Ancienne
dies.	dieselbe
Dig. disc. priv., Sez. civ.	Digesto (discipline privatistiche) sezione civile
Dir.	sous la direction de
Dir. comm. internaz.	Diritto del commercio internazionale
Dir. giur.	Diritto e giurisprudenza
Dir. giust.	Diritto e giustizia
Dir. mar.	Il diritto marittimo
dir. priv.	diritto privato
dir. rom.	diritto romano
dir. vig.	diritto vigente
disp.	disputatio/disputationes
DJT	Deutscher Juristentag
DJZ	Deutsche Juristenzeitung
DÖV	Die Öffentliche Verwaltung. Zeitschrift für Öffentliches Recht und Verwaltungswissenschaften
DP	Recueil périodique et critique mensuel Dalloz (avant 1941)
Dr. et patr.	Droit et patrimoine
dub.	dubitatio/dubitationes
E I	Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich. Erste Lesung. Ausgearbeitet durch die von dem Bundesrathe berufene Kommission
E II	Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich. Zweite Lesung. Nach den Beschlüssen der Redaktionskommission
E. B. & E	Ellis, Blackburn & Ellis' Queen's Bench Reports
E. G. L. R.	Estates Gazette Law Reports
E. R./Eng. Rep.	English Reports
East	East's Term Reports, King's Bench
ED	Enciclopedia del Diritto
Éd./ed.	Édition /edition
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
Europa dir. priv.	Europa e diritto privato
EWCA Civ	England & Wales Court of Appeal (Civil Division)
EWHC	England & Wales High Court
Exch	Exchequer Reports

f.	folgende/following
Fam. dir.	Famiglia e diritto
ff.	folgende/following
Fn.	Fußnote
fol.	folium/folia
Foord's Rep.	Foord's Reports
Foro amm. TAR	Il Foro amministrativo – T.A.R.
Foro it.	Il Foro italiano
FS	Festschrift
Gaz. Pal.	Gazette du Palais
GG	Grundgesetz
Giur. comm.	Giurisprudenza commerciale
Giur. it.	Giurisprudenza italiana
Giust. civ.	Giustizia civile
gl.	glossa
Gruchot	Beiträge zur Erläuterung des deutschen Rechts/Gruchots Beiträge
GS	Gedächtnisschrift
h. M.	herrschende Meinung
H. & N.	Hurlstone & Norman's Exchequer Reports
Harv. L. Rev.	Harvard Law Review
HCA	High Court of Australia
Hg.	Herausgeber
hgg./hrsg.	herausgegeben
HKK	Historisch-Kristischer Kommentar zum BGB, hrsg. von Mathias Schmoeckel/Joachim Rückert/Reinhard Zimmermann
HL	House of Lords
HLC./HL Cas	Clark & Finnelly's House of Lords Reports New Series
i. e.	id est
ibid	ibidem
id.	idem
Index	Index. Quaderni Camerti di studi romanistici
Inst.	Institutiones
Israel L. Rev.	Israel Law Review
J	Justice
J. C.	Jésus-Christ
JCP	Semaine juridique (édition générale)
JCP E	Semaine juridique (édition entreprise)
JR	Juristische Rundschau
JZ	Juristenzeitung
KB	Law Reports, King's Bench Division
KE	Kommissionsentwurf

Law & Hist. Rev.	Law and History Review
Law Quart. Rev.	Law Quarterly Review
Law Rev.	Law Review
Ld. Raym.	Lord Raymond's King's Bench and Common Pleas Reports
Leon.	Leonard's Reports
LG	Landgericht
lib.	liber/liberi
LJ/LLJ	Lord/Lady Justice/Justices
Lloyd's Rep.	Lloyd's Law Reports
LPA	Les Petites Affiches
LR CP	Law Reports, Common Pleas (1st Series)
LR Ex	Law Reports, Exchequer Cases
LR QB	Law Reports, Queen's Bench (1st Series)
LT	Law Times Reports
m. w. N.	mit weiteren Nachweisen
MEFRA	Mélanges de l'École française de Rome
Mod. L. Rev.	Modern Law Review
Motive	Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich
Mugdan	Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich
n°/n.	numéro/numero
N. E.	North Eastern Reporter
N. W.	North Western Reporter
Nr.	Nummer
num.	numerus/numeri
NJW	Neue Juristische Wochenschrift
NJW-FER	NJW-Entscheidungsdienst Familien- und Erbrecht
NJW-RR	Neue Juristische Wochenschrift Rechtsprechungs-Report
Nov. dig. it.	Novissimo Digesto Italiano
NSWLR	New South Wales Law Reports (Australia)
nt.	nota
Nuova giur. civ. comm.	Nuova giurisprudenza civile commentata
Nuova riv. dir. comm.	Nuova rivista di diritto commerciale, diritto dell'economia, diritto sociale
NZLR	New Zealand Law Reports
OGH	Oberster Gerichtshof
OHGZ	Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Zivilsachen
OIR	Orbis iuris Romani – Journal of Ancient Law Studies
OLG	Oberlandesgericht
op. cit.	opere citato
OR	Obligationenrecht
ord.	ordinanza

p.	pagina/page
para./paras.	paragraph, paragraphes
PC	Privy Council
PECL	Principles of European Contract Law
Plow.	Plowden's Commentaries or Reports
pp.	paginae/pages/pagine/pages
Protokolle	Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs
PUAM	Presses universitaires d'Aix-Marseille
PUF	Presses universitaires de France
QB	Law Reports, Queen's Bench Division (3rd Series)
QBD	Queen's Bench Division
QLSD	Quaderni Lupiensi di Storia e Diritto
qu.	quaestio/quaestiones
Quaderni Fiorentini	Quaderni Fiorentini per la storia del pensiero giuridico moderno
Queen's Bench Rep.	Queen's Bench Reports (1841–1852)
Rass. dir. civ.	Rassegna di diritto civile
RDC	Revue des contrats
REA	Revue des études anciennes
Real. Ist. lomb. Scienz. lett. Rend.	Reale Istituto Lombardo di Scienze e Lettere. Rendiconti
REL	Revue des Études Latines
Rép. civ.	Encyclopédie Dalloz, Répertoire de droit civil
Rep. Foro it.	Repertorio del Foro italiano
resp.	responsio/responsiones
Resp. civ. prev.	Responsabilità civile e previdenza
Rev. int. dr. comp.	Revue internationale de droit comparé
RG	Reichsgericht
RGBl.	Reichsgesetzblatt
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RH	Revue Historique
RIDA	Revue internationale des droits de l'Antiquité
Riv. crit. dir. priv	Rivista critica del diritto privato
Riv. dir. banc.	Rivista di diritto bancario
Riv. dir. civ.	Rivista di diritto civile
Riv. dir. comm.	Rivista del diritto commerciale e del diritto generale delle obbligazioni
Riv. not.	Rivista del notariato
Riv. trim. dir. proc. civ.	Rivista trimestrale di diritto e procedura civile
Rn.	Randnummer
Rom. Amer.	Roma e America. Diritto romano comune. Rivista di diritto dell'integrazione e unificazione del diritto in Europa e in America Latina
Roma Tre L. Rev.	Roma Tre Law Review
RTD civ.	Revue trimestrielle de droit civil
Rz.	Randziffer

s.	suivante/e seguente
S.	Seite
s. v.	sub voce
SA Law Rep., Appellate Div.	South Africa Law Reports, Appellate Division
Sächs. Archiv	Sächsisches Archiv für bürgerliches Recht und Prozeß/ Sächsisches Archiv für deutsches bürgerliches Recht
Salk	Salkeld's King's Bench Reports
ScheckG	Scheckgesetz
SDHI	Studia et documenta historiae et iuris
sez.	Sezione
sez. un.	Sezioni unite
Sp.	Spalte
spéc.	spécialement
ss.	e seguenti
Str.	Strange's King's Bench Reports
StVG	Straßenverkehrsgesetz
t. u. f.	Decreto Legislativo del 24 febbraio 1998, n. 58
Tem. em.	Temi emiliana
Term Rep.	Term Reports (Durnford & East), King's Bench
Th. L. L.	Thesaurus Linguae Latinae
TLR	Times Law Reports
tom.	tomus/tomi
TR	Tijsdchrift voor rechtsgeschiedenis – Revue d'histoire du droit
tr./Trad.	translation/traduction
Transvaal Supreme Court Rep.	Transvaal Supreme Court Reports (South Africa, 1904-1909)
Trib.	Tribunale
u. a.	unter anderem
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
Univ. Queensland Law Journal	University of Queensland Law Journal (Australia)
v	versus
v.	voir/vedi
v. not.	voir notamment
vgl.	vergleiche
Vita not.	Vita notarile
vol.	volume
VwVfG	Verwaltungsverfahrensgesetz
W. Jones	W. Jones' King's Bench and Common Pleas Reports
WG	Wechselgesetz
WLR	Weekly Law Reports
WM	Wertpapier-Mitteilungen. Zeitschrift für Wirtschafts- und Bankrecht

Yale L. J.	Yale Law Journal
Z.	Zeile
ZEuP	Zeitschrift für Europäisches Privatrecht
ZGB DDR	Zivilgesetzbuch der DDR
Ziff.	Ziffer
ZRG GA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung
ZRG RA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung

Why Cause of Contract again, and how?

Gregor Albers

"The fundamental things apply
as time goes by."
From the movie Casablanca (1942)

I. Resilience of a notion

One might wonder whether we still need to talk about it. The reform of the French law of obligations, the *ordonnance* from 10 February 2016, has deleted *cause* as a requirement for the creation of a valid contract from the Code civil.[1]

From 1804 until then, the Code's venerable article 1108 had listed the necessary elements of a valid contract (*convention*). Besides consent and capacity of the party incurring an obligation, it required not only that this obligation had a determined object, but also that it was based on a legitimate cause.[2] For all contracts concluded since 1 October 2016, the new article 1128 n. 3 of the Code asks for no more than a legitimate and specified content.[3]

To many, this abolition of *cause* has appeared to be merely the last step of a continuous and rather necessary process.[4] In 1992, the Dutch had expelled the

[1] Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, JORF n°0035 du 11 février 2016, texte n. 26.

[2] Art. 1108 Code civil 1804: "Quatre conditions sont essentielles pour la validité d'une convention: Le consentement de la partie qui s'oblige; Sa capacité de contracter; Un objet certain qui forme la matière de l'engagement; Une cause licite dans l'obligation".

[3] Art. 1128 Code civil 2016: "Sont nécessaires à la validité d'un contrat: 1° Le consentement des parties; 2° Leur capacité de contracter; 3° Un contenu licite et certain".

[4] For criticism of *causa* from a historical and comparative point of view, see *Ernest G. Lorenzen*, Causa and Consideration in the Law of Contracts, Yale L.J. 28 (1919) 621–646; *John P. Dawson*, Gifts and Promises. Continental and American Law Compared (New Haven/London 1980) 114–116; *Konrad Zweigert/Hein Kötz*, An Introduction to Comparative Law (tr. Tony

oorzak from their new civil code.[5] In 1994, the *UNIDROIT Principles* had proclaimed: "A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement".[6] Not only had that been upheld by the *Principles of European Contract law*[7] in 1998 and later by the *Draft Common Frame of Reference*,[8] where it might be argued that German lawyers had the upper hand, even the working group led by *Giuseppe Gandolfi*, which had published the first part of its *Avant-projet* of a *Code Europeen des contrats* in 2001, had turned away from *causa* as a necessary element of contract.[9]

This tendency has supported the claim of the French reformers that abolishing *cause* would align the Code with foreign legal systems, thus furthering one of the main aims of the reform: to increase the international attraction of France as a place to "do business".[10] We have now come to a point where *causa* has been reduced to a mere footnote in the Oxford Handbook on Comparative Law.[11]

Weir, 3rd ed., Oxford/New York 1998) 381; *Reinhard Zimmermann*, The Law of Obligations. Roman Foundations of the Civilian Tradition (Cape Town/Wetton/Johannesburg 1990) 553.

[5] Art. 1356 Burgerlijk Wetboek 1838 followed art. 1108 Code civil 1804 and required a "geoorloofde oorzaak" as a fourth condition for a valid obligation. The *Nieuw Burgerlijk Wetboek* 1992 manages without summing up the conditions of a contract. Instead, art. 3:40 declares void any legal act that in its content ("inhoud") or aim contravenes good morals, public order or mandatory statutes. See *Hans Ankum*, La causa del contratto nello sviluppo del diritto olandese fino al nuovo codice civile del 1992, in: Letizia Vacca (ed.), Causa e contratto nella prospettiva storico-comparatistica (Turin 1997) and extensively *Yorick M. Ruland*, Die Causa der Obligation. Rechtshistorische und rechtsvergleichende Perspektive nach Einführung des Nieuw Burgerlijk Wetboek in den Niederlanden (Cologne/Berlin/Munich 2004), in particular 13, 138 ff.

[6] Art. 3.2 UNIDROIT Principles of International Commercial Contracts (International Institute for the Unification of Private Law, Rome 1994).

[7] See art. 2:101 (1): "A contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement without any further requirement"; Ole Lando/Hugh Beale (eds.), Principles of European Contract Law, Parts I and II, Combined and Revised (The Hague 2000).

[8] See art. II-4:101: "A contract is concluded, without any further requirement, if the parties: (a) intend to enter into a binding legal relationship or bring about some other legal effect; and (b) reach a sufficient agreement"; Christian von Bar/Eric Clive/Hans Schulte Nölke et al. (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition (Munich 2008).

[9] See art. 5 n. 3 ("Les éléments essentiels du contrat sont: a) l'accord des parties; b) le contenu."); on "Autonomie contractuelle" cf. art. 2 n. 1: Code Europeen des Contrats. Avant-projet (Milan 2001). From the commentary by *Giuseppe Gandolfi* cf. in particular 125 ff., 142 ff.

[10] See Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, JORF n°0035 du 11 février 2016, texte n. 25. For the reference to the "Doing business" reports of the World Bank, cf. on page 2 under "Genèse de la reforme".

[11] *Hein Kötz*, Comparative Contract Law, in: The Oxford Handbook of Comparative Law, ed. by Mathias Reimann/Reinhard Zimmermann (2nd ed., Oxford 2019) 902–932, 909 n. 24: "French law used to follow a rule […]". More generous is *Gregor Christandl*, in: Commentaries on European Contract Laws, ed. by Nils Jansen/Reinhard Zimmermann (Oxford 2018) Art. 2:101 (1) n. 19 (245–247).

But the rebuttal of *causa* is not universal. To the contrary, the notion still prospers in many legal orders. Those countries which once embraced *cause* together with Napoleon's Code do not seem to be inclined to follow the French example again, this time abolishing it.[12] As recent as 2017, the Principles of Latin American Contract Law upheld explicitly that: "Consent, subject-matter, cause, and in certain cases, formalities, are the elements required to form a contract".[13]

Even where, in the attempt to depart with *causa*, one succeeds to erase it from a code, it is doubtful whether that makes the doctrine disappear. One example is well known in Germany: An obligation can be countered with the objection that it unjustly enriches the creditor. Studying the reason for this objection (usually described as its lack of cause), *Bernhard Windscheid* had identified it with the non-fulfilment of a presupposition (*Voraussetzung*) of the promisor. When the commission in charge of drafting the Civil Code refused to enshrine that theory, he made a prophecy: Thrown out of the door, it would come back in through the window.[14] Some thirty years later, he was proven right by the general recognition of the doctrine of basis of contract (*Geschäftsgrundlage*).[15] A similar metaphor has now been used by a French politician to mollify concerns about the removal of *cause*: "If *cause* has left towards the garden, it has re-entered from the courtyard".[16]

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[12] In Italy, few wish to change article 1325 or 1343 of the Codice civile of 1942; see *Elena Bargelli*, Il futuro della causa nel diritto italiano, in this volume, 733–754. On Quebec, California, Louisiana and South Africa see *Birke Häcker*, *Causa* und *consideration*. Ein historischer Dialog, in this volume, 323–369 (348–353). For Belgium, see art. 5.27 of the proposed law of obligations (n°55-1806/1).

[13] The English translation of the article has been taken from Rodrigo Momberg/Stefan Vogenauer (eds.), The Future of Contract Law in Latin America: The Principles of Latin American Contract Law (Oxford 2017). In the original version, art. 9 reads: "Elementos del contratto. Son elementos para la formación del contrato, el consentimiento, el objeto, la causa y en ciertos casos, la solemnidad"; Iñigo de la Maza/Carlos Pizarro/Álvador Vidal (coord. and eds.), Los principios Latinoamericanos de derecho de los contratos (Madrid 2017). The argument in favour of the inclusion of *causa* is presented in that volume by *de la Maza/Vidal*, El Contenido: Una primera aproximación, 27–75, 33 ff.; an English version is presented by *Iñigo de la Maza*, The Notion of Contract and its Essential Elements in the Principles of Latin American Contract Law, in: Momberg/Vogenauer, loc. cit. 163–177, 174 f.

[14] *Bernhard Windscheid*: "Zur Thüre hinausgeworfen, kommt sie zum Fenster wieder herein"; Die Voraussetzung, AcP 78 (1892) 161–202, 197 = Gesammelte Reden und Abhandlungen, ed. by Paul Oertmann (Leipzig 1904) 375–409, 406.

[15] On the *Voraussetzungslehre*, see my contributions on *causa* in 19th century Germany (*Gregor Albers*, Die *causa* vom *Code Civil* zum BGB. Zuwendungen tragen statt Verpflichtungen begründen, in this volume, 263–321, 293 f. note 157) and on unexpected circumstances under German law (*Gregor Albers*, Der Einfluss unerwarteter Ereignisse auf den Vertrag nach deutschem Recht, in this volume, 573–635, 575–582) as well as the article by *Horst Ehmann*, Zu den Arten der Rechtsgründe von Leistungen und Leistungsversprechen. Von der *causa*-Lehre zur Zwecklehre, in this volume, 755–869, 762–764, 769–772.

[16] *François Pillet*: "si la cause est sortie côté jardin, elle est rentrée côté cour !", cited by *Thomas Genicon*, L'avenir de la cause en droit français des contrats, in this volume, 715–731, 717.

The idea that *cause* may persist has been nourished by the reformers themselves. Modernization, not revolution had been the proclaimed aim of 2016's *ordonnance*. The wording of the code should once again specifically express the rules which the courts actually followed, making the law more transparent and judgments more predictable. At the same time, reformers claimed that the courts would still be able to obtain the practical results once grounded on *cause*.[17] That's why, in an attempt to appease, the *rapport* describes the relinquishment of *cause* as being merely formal, dubbing it "abandon formel de la notion de la cause".[18] Such a formal abolition seems to be mostly symbolic in nature; and it is rather unclear how a practice deemed unpredictable is supposed to become more predictable while at the same time remaining unchanged.[19] Does that mean that the reform is no more than an attempt to deceive the eye, a means to preserve the *status quo*?[20] From a practical point of view, it seems rather probable that the policies associated with the notion of *cause* are even strengthened by the formal abolition of that notion: What used to be an open principle whose invocation was debated in individual cases has been replaced by a set of articles distilled from that caselaw (but sometimes based on a single court decision). As those articles establish abstract rules, judges can be expected to apply them rather broadly, extending them to cases they would have decided differently had they only regarded the old principle and the case law.[21] In order to provide a coherent explanation of the new articles and the decisions deduced from their wording, jurisprudence might want to stick with the notion of *cause*, enriching its meaning to cover the new fields of application.

II. Why? Fundamental problems

The resilience of *causa* bears witness of its connection with fundamental problems of contract law. On the eve of the reform in France, *cause* was mostly viewed as a stumbling block for a liberal approach to contract law, a restriction of the parties' autonomy, a tool for public control and regulation of private agreements. In 2012, *Denis Mazeaud* had described the controversy as follows: "From a per-

[17] See the rapport (n. 10) under "Objectifs de la réforme" on page 3 and under chapter II, section II ("La validité du contrat") on page 8.

[18] See the rapport (n. 10) under "Objectifs de la réforme" on page 3, second paragraph.

[19] For an analysis of the reform as a means of communication Gaël Chantepie/Nicolas Dissaux, Le nouveau discours contractuel. Rapport introductif, Revue des Contrats 2016, 572–580, in particular 576 f. They perceive a fundamental conflict between modernization and legal certainty: "à bien réfléchir, les deux objectifs sont résolument contradictoires" (575).

[20] One is reminded of Tancredi's motto: "If we wish everything to stay as it is, it is necessary that everything changes" ("Se vogliamo che tutto rimanga come è, bisogna che tutto cambi"). See also Chantepie/Dissaux (n. 19): "Les éléments du discours changent, sans en affecter le contenu. Il fallait ainsi que tout change, pour que rien ne change" (577).

[21] For an extensive discussion, see the article by *Thomas Genicon*, L'avenir (n. 16).

spective of legal politics […] the adepts of contractual liberalism face the others, bearers of the grand French tradition or partisans of a more moral vision of contract law".[22] This interpretation is supported by the parallel case of the Netherlands, where the abolition of *oorzak* has been driven by liberal intentions.[23]

This way of looking at *causa* seems quite natural to a German lawyer who has been taught that all agreements intended to be legally binding should be effective as contracts, if they are not nullified by some specific rule. Conformity with law and morality, for example, is not considered an essential element of contract in German law, although illegality and to an extent also immorality are reasons for a contract's invalidity.[24] What seems to be only a matter of perspective might actually account for a *laissez-faire*-attitude of German jurists and courts.[25] The new art. 1128 n. 3 accommodates the German position insofar as, in lieu of the *cause licite*, it requires no more than *un contenu licite e certain*, a legitimate and determinable content. Whereas *cause* invited interpreters to search for an external justification of contract, the reference to its content isolates the contract, urging it to stand alone and speak for itself. At the same time, the rules on illegality give a prime example how policies connected to *cause* have survived its elimination: Prior to the reform, the courts had held that a contract is ineffective if only one party pursued an illegal aim, even if the other party knew nothing about it.[26]

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[22] Denis Mazeaud, Avant-propos, to: Henri Capitant, De la Cause des Obligations (Contrats, Engagements unilatéraux, Legs), Réimpression de l'édition de 1927 (Paris 2012) i-iv, ii: "Dans une perspective de politique juridique, d'une part, s'opposent les adeptes du libéralisme contractuel et les autres, tenants de la grande tradition française ou partisane d'une vision plus morale du droit des contrats. Les premiers considèrent que la protection des intérêts privés des contractants est suffisamment assurée […] De même, dans la perspective de la protection de l'intérêt général contre les contrats contraires à l'ordre public et aux bonnes mœrs, la cause est superflue […] Les autres considèrent qu'il est necessaire d'assurer la protection des contractants contre les déséquilibres structurels qui peuvent affecter les contrats qu'ils ont conclus […] De même grâce à sa souplesse, la cause demeure l'instrument le plus performant pour lutter conre les contrats par la conclusion desquels les contractants poursuivaient un but immoral ou illicite".

[23] See Eduard Maurits Meijers, Ontwerp voor een Nieuw Burgerlijk Wetboek, Toelichting, Derde Gedeelte (Boek 6), ('s-Gravenhage 1961) 749 ff., 752; on which see Ruland (n. 5) 107. A liberal spirit is also present in Gandolfi (n. 9) 128 ff. – It seems that divergent motives have come together in the French reform; see Dominique Fenouillet, Les valeurs morales, RDC 2016, 589–599 ("la liberté": 591 ff., "la vertu": 593 ff.); Frédéric Rouvière, Les valeurs économiques de la réforme du droit des contrats, RDC 2016, 600–607.

[24] Cf. §§ 134, 138 BGB.

[25] Although the practical results do not always reflect that attitude; see the article by *Ralf Treibmann* on the requirements of valid contracts in German law, Voraussetzungen der Wirksamkeit von Verträgen nach deutschem Recht, in this volume, 425–453, 448.

[26] Cass. civ. 1ère 7.10.1998, n° 96-14.359; see *Samuel Fulli-Lemaire*, Le rôle passé de la cause au stade de la formation du contrat, in this volume, 407–424, 423 f. At first glance, this rule sounds strange to a German lawyer. It was already upheld by *Georges Ripert*, La règle morale dans les obligations civiles (Paris 1925) 57 ff., 66, against *Capitant*, De la cause (n. 22) n°4, 22 ff. Ripert does not hide his drift: "Pour briser les conventions immorales, il a fallu créer le moyen technique nécessaire qui les atteindrait toutes" (57). The scandalized German lawyer

The rule is now enshrined in art. 1162 Code civil.[27]

If the removal of *cause* from the Code were indeed a victory of liberal contract theory, this victory would not fit into one of the grand narratives of modern history of private law, a tendency which in Germany is described as materialisation (*Materialisierung*) and which was first observed by *Max Weber*.[28] In "Faktizität und Geltung" (1992), *Jürgen Habermas* marks this development as follows: The 19th century's "bourgeois formal law" (*bürgerliches Formalrecht*) assumes that every person possesses the same amount of freedom. It tries to guarantee freedom and equality simply by not interfering with human interactions. But the market has failed manifoldly. The new welfare state model (*sozialstaatliches Modell*) considers private actors as being determined by their unequal social positions. In this model, the private law's task is to intervene by regulation to establish free-

might be reassured when told that the immoral party would not have been allowed to rely on that ineffectiveness.

[27] Art. 1162 Code Civil 2016: "Le contrat ne peut déroger à l'ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties". Cf. also the rapport (n. 10): "Par ailleurs est reprise la solution jurisprudentielle selon laquelle le contrat est nul lorsque l'une des parties poursuit un but illicie, même si l'autre partie n'avait pas connaissance de ce but" (under subsection 3: "Le contenu du contrat", p. 11).

[28] On "tendencies favourable to the dilution of legal formalism" ("Tendenzen, welche eine Auflösung des Rechtsformalismus begünstigen") see *Max Weber*, Rechtssoziologie, § 8, in: Werner Gephart/Siegfried Hermes (eds.), Max Weber-Gesamtausgabe, Bd. I/22-3 (Tubingen 2010) 620–632, in particular 623: "Nun aber entstehen mit dem Erwachen moderner Klassenprobleme materiale Anforderungen an das Recht von seiten eines Teils der Rechtsinteressenten (namentlich der Arbeiterschaft) einerseits, der Rechtsideologen andererseits, welche sich gerade gegen diese Alleingeltung solcher nur geschäftssittlicher Maßstäbe richten und ein soziales Recht auf der Grundlage pathetischer sittlicher Postulate (‚Gerechtigkeit', ‚Menschenwürde') verlangen. Dies aber stellt den Formalismus des Rechts grundsätzlich in Frage. Denn die Anwendung von Begriffen wie ‚Ausbeutung der Notlage' (im Wuchergesetz) oder die Versuche, Verträge wegen Unverhältnismäßigkeit des Entgeltes als gegen die guten Sitten verstoßend und daher nichtig zu behandeln, stehen grundsätzlich auf dem Boden von, rechtlich betrachtet, antiformalen Normen, die nicht juristischen oder konventionellen oder traditionellen, sondern rein ethischen Charakter haben, materiale Gerechtigkeit statt formaler Legalität beanspruchen". The following English translation unfortunately substitutes "material" with "social": "New demands for a 'social law' to be based upon such emotionally colored ethical postulates as 'justice' or 'human dignity', and directed against the very dominance of a mere business morality, have arisen with the emergence of the modern class problem. They are advocated not only by labor and other interested groups but also by legal ideologists. By these demands legal formalism itself has been challenged. Such a concept as economic duress, or the attempt to treat as immoral, and thus as invalid, a contract because of a gross disproportion between promise and consideration, are derived from norms which, from the legal standpoint, are entirely amorphous and which are neither juristic nor conventional nor traditional in character but ethical and which claim as their legitimation substantive justice rather than formal legality." It is taken from Guenther Roth/Claus Wittich (eds.), Economy and Society. An outline of interpretive sociology (Berkeley/Los Angeles/London 1968) 886. – On the difference between formal freedom of contract and a material increase or decrease of liberty cf. also § 2 (425–428 and 453–455, in the translation: 729–731).

dom in the first place.[29] Novel contract law denies certain contractual agreements their legal validity or modifies their content.[30] In order to test the validity of a contract, it is no longer enough to formally verify whether or not there is an agreement; the test has to be expanded to examine that agreement's material content against the background of the parties' individual situation.

In Germany, the trend towards materialisation has characterised private law from the first draft of the BGB up until today. To this materialisation, we owe the legislative protection of employees and tenants. It explains why the law protects relatives who offer themselves as guarantors despite having no personal assets.[31] Materialisation's newer manifestations include the minimum wage[32] and the so-called "rent brake" (*Mietpreisbremse*), which prohibits rental prices higher than ten per cent above the average rent in areas with a strained residential situation.[33] Materialisation is particularly present in the law passed by the European Union. The Commission's tendency to devise contract law as *ius cogens*[34] could even induce the idea that, by default, it distrusted all contracts concluded by consumers.

Materialisation describes private law as increasingly becoming the subject of political design. Once material justice has been placed alongside formal justice of exchange, private law quickly becomes an instrument for achieving distributive justice and promoting other objectives of the state or political interests.

If one drives materialisation to the extreme, the fact that the parties have consented on their contractual terms is no more than an indication that the contract

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[29] *Jürgen Habermas*, Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy, translated by William Rehg (Cambridge, MA 1998) 392–409. *Habermas* does see the problem of "welfare-state paternalism": "But with such overwhelming provisions, the welfare state obviously runs the risk of impairing individual autonomy, precisely the autonomy it is supposed to promote by providing the factual preconditions for the equal opportunity to exercise negative freedoms" (407). He reassures the reader by pointing out the "political autonomy" enjoyed by citizens of a democracy: "These persons are autonomous, however, only insofar as they can at the same time understand themselves as authors of the law to which they are subject as addressees" (408). For the German original, see *Jürgen Habermas*, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (5th ed., Frankfurt am Main 2014) 477–493, in particular 490 ff.

[30] On *Materialisierung des Vertragsrechts* more recently *Claus-Wilhelm Canaris*, Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung", AcP 200 (2000) 273–364; *Marietta Auer*, Materialisierung, Flexibilisierung, Richterfreiheit. Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens (Tubingen 2005) 22 ff.; *Günter Hager*, Strukturen des Privatrechts in Europa. Eine rechtsvergleichende Studie (Tubingen 2012) 13 ff.; *Stefan Arnold*, Vertrag und Verteilung (Tubingen 2014) 226–261.

[31] On these cases, see *Treibmann*, Voraussetzungen (n. 25) 450 f.

[32] Gesetz zur Regelung eines allgemeinen Mindestlohns vom 11.8.2014, BGBl. I 1348.

[33] Gesetz zur Dämpfung des Mietanstiegs auf angespannten Wohnungsmärkten und zur Stärkung des Bestellerprinzips bei der Wohnungsvermittlung vom 21.4.2015, BGBl. I 610.

[34] See the criticism by *Gerhard Wagner*, Zwingendes Vertragsrecht, in: Horst Eidenmüller/Florian Faust/Hans Christoph Grigoleit/Nils Jansen/Gerhard Wagner/Reinhard Zimmermann (eds.), Revision des Verbraucher-acquis (Tubingen 2011) 1–52.

contains provisions which are societally desirable and should thus be enforced. The consequent execution of this idea originates from *Walter Schmidt-Rimpler* and dates not without reason from 1941; it was commissioned by the national socialist Academy for German Law (*Akademie für Deutsches Recht*).[35] At the same time, *causa* was put into service for the materialisation of contract law in Italy. When the *Ministro Guardasigilli* presented the draft for a new Codice civile in 1942, its explanatory memorandum construed *causa* as a contract's "economic-social function" (*funzione economico-sociale*). It argued that the parties' private autonomy should only be preserved if their contract's purpose was worthy of social acceptance. Thus, *causa* was considered a control mechanism essential for a fascist code.[36]

Even though the standards against which contracts are evaluated may have changed, the trend of materialisation remains. Nowadays, materialisation is driven primarily by economic analysis of law, which reduces the legal order as a whole, and thus all subjective rights, to factors of aggregated utility.

Due to this overall trend, it is rather unlikely that the retreat of *cause* should really turn out to be a triumph of private autonomy and liberalism. And indeed, the opposition of *causa* and individual autonomy can be contested. When *causa* is defined as the aim pursued by the parties to an agreement, having regard for *causa* means no more than respecting their intentions. A German doctrine of *causa* built on this position presents itself as a stronghold of autonomy against

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[35] *Walter Schmidt-Rimpler*, Grundfragen einer Erneuerung des Privatrechts, AcP 147 (1941) 130–197. The author deprived contract law of its old basis, but essentially, without change, rebuilt it on new grounds. Thus, he defended it in terms of content against other National Socialist reform efforts. Schmidt-Rimpler's theses also received attention after the war; he repeated them in Festschrift Ludwig Raiser (Tubingen 1974) 3–26.

[36] Relazione alla Maestà del Re Imperatore del Ministro Guardasigilli (Grandi) presentata all'udienza del 16 marzo 1942-XX per l'approvazione del testo del "Codice Civile", n. 613: "Non ostante gli equivoci e le critiche a cui il requisito della causa ha dato luogo, si è stimato necessario conservarlo e anzi conferirgli massima efficienza, non solo e non tanto in omaggio alla secolare tradizione del nostro diritto commune […] quanto, e sopratutto, perchè un codice fascista, ispirato alle esigene della solidarietà, non può ignorare la nozione della causa senza trascurare quello che deve essere il contenuto socialmente utile del contratto. Bisogna infatti tener fermo […] che la causa richiesta dal diritto non è lo scopo soggiettivo, qualunque esso sia, perseguito dal contraente nel caso concreto […] ma è la funzione economico-sociale che il diritto riconosce rilevante ai suoi fini e che sola giustifica la tutela dell'autonomia privata. Funzione pertanto che deve essere non soltanto conforme ai preceti di legge, all'ordine pubblico e al buon costume, ma anche […] rispondente alla necessità che il fine intrinseco del contratto sia socialmente apprezzabile e come tale meritevole della tutela giuridica" (in: Codice Civile, Testo e Relazione Ministeriale, Roma 1943-XXI, 9–284, 132). The interpretation of *causa* as "funzione economico-sociale" has been developed by *Emilio Betti*; see Teoria generale del negozio giuridico, Seconda ristampa della seconda edizione (Turin 1955) 51 ff., 171 ff. (first edition was 1943). See the article by *Andrea Maria Garofalo* on the progression from the French Code civil to the Italian Code from 1942 (Itinerari della causa dal Code civil del 1804 al Codice civile del 1942, in this volume, 201–245).

certain "objective" (*objektive*) theories, denouncing them as servants of collective interests.[37] *Causa* can provide the battlefield for the conflict between more liberal and more collective theories of contract law. But it doesn't need to be all about that controversy.

Causa can actually channel most of what any contract theory does. The Canadian *Stephen Smith*, author of the only textbook on the matter, defines contract theories as "interpretations of contract law". *Smith* demands that a comprehensive theory explain how obligations arise out of contract and why the law enforces them.[38]

As the first modern examination of the normative foundation of contract, one usually cites[39] an essay by *Fuller* and *Perdue* from 1936.[40] The authors question why the damages awarded to a promisee are calculated to compensate her expectation interest. Respecting her expectations, the law confers upon the creditor an advantage which she, according to *Fuller* and *Perdue*, has not had before. It does not only compensate losses but exercises distributive justice.[41] They argue that the obligation to reimburse the creditor her expectation interest can at best be justified indirectly: By sparing her from having to prove actual losses from reliance on the contract, it is nevertheless her reliance interest which is protected. Furthermore, the sanctity of contracts is encouraged by way of deterrence.[42] By qualifying the expectation interest as overcompensation, the authors implicitly reject that the contract itself has the power to assign the future performance to the creditor's assets.

By explaining the obligatory effect of the contract with the other party's reliance, *Fuller* and *Perdue* establish a "reliance theory" in the sense of *Smith*. In recent decades, however, attempts have reappeared to found the effects of contract on the parties' will: Like the medieval canon lawyers, *Charles Fried* draws upon the moral commitment of the promise and has thus, since 1981, been the most prominent advocate of a "promissory theory".[43] One can trace all the way back

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[37] See *Ehmann*, Rechtsgründe (n. 15) (dissenting in particular with the doctrines of *Erfüllung durch reale Leistungsbewirkung* and *objektiver Rechtsgrund*).

[38] *Stephen A. Smith*, Contract Theory (Oxford 2004) 5. – For German contract theory of today, see on the one hand, *Florian Rödl*, Gerechtigkeit unter freien Gleichen. Eine normative Rekonstruktion von Delikt, Eigentum und Vertrag (Baden Baden 2015) in particular 267–361 (in the spirit of *Ernest Weinrib*); on the other hand, *Bertram Lomfeld*, Die Gründe des Vertrages. Eine Diskurstheorie der Vertragsrechte (Tubingen 2015) (in the spirit of *Jürgen Habermas*).

[39] As articulated by *Peter Benson*, Introduction, in: Peter Benson (ed.), The Theory of Contract Law. New Essays (Cambridge 2001) 1–18, 1 ff. See also *Patrick S. Atiyah*, Fuller and the Theory of Contract, in: Essays on Contract (Oxford 1986) 73–92 (originally published in the Duke Law Journal 1983).

[40] *L. L. Fuller/William R. Perdue, Jr.*, The Reliance Interest in Contract Damage, Yale L. J. 46 (1936–1937) 52–96 and 373–420. The article has also become famous for the distinction of "reliance interests", "expectation interests" and "restitution interests".

[41] Ibid., 53.

[42] Ibid., 57.

[43] *Charles Fried*, Contract as Promise. A Theory of Contractual Obligation (Cambridge, MA 1981), and *Charles Fried*, The Ambitions of Contract as Promise, in: Gregory Klass/George

to at least *Hugo Grotius* the "transfer theories" which interpret contract as a transfer of rights; a position recently defended by *Peter Benson*.[44]

Because voluntarist interpretations of contracts centre upon the individual and their intentions, they have a tendency to be of a liberal character. However, criticism of these theories is not necessarily directed against their basic political trend; above all, it does not have to be motivated by a desire for more regulation. Substituting voluntarism with a more comprehensive approach does not automatically imply abandoning the individualist point of view in favour of a collective perspective. The question is rather whether the mechanisms of contract law can really be modelled as effects of the parties' will.

Especially *Patrick Atiyah* argues (in his 1978 essay "Contracts, Promises and the Law of Obligations") that the will is not the appropriate criterion for the existence of a contract. He suspects that the legal mind works the opposite way: One can assume the existence of a will where one has already decided to find a contractual obligation.[45] *Atiyah* deems it arbitrary to interpret the act of boarding a bus as a promise to pay the fare. If that were right, according to *Atiyah*, one might as well say that partaking in road traffic entails a promise to adhere to the traffic rules.[46] This approach would allow all traffic accidents to be dealt with through contract law. According to *Atiyah*, it would be more reasonable to do away with contracts and construe liabilities based on reliance induced in others and on the reception of goods and services.[47] An explicit contractual promise could at most serve as evidence of those obligations.[48]

Letsas/Prince Saprai (eds.), Philosophical Foundations of Contract Law (Oxford 2014) 17–41. This volume contains also important criticism, see *Joseph Raz*, Is There a Reason to Keep a Promise?, 58–77, *Liam Murphy*, The Practice of Promise and Contract, 151–170, and *Aditi Bagchi*, Distributive Justice and Contract, 193–211.

[44] *Peter Benson*, Justice in Transactions. A Theory of Contract Law (Cambridge MA/London 2019), on which cf. ERCL 2021, 127–283.

[45] *Patrick S. Atiyah*, Contracts, Promises and the Law of Obligations, in: Essays on Contract, Oxford 1986, 10–56, 24 (originally in Law Quart. Rev. 1978).

[46] Ibid., 19: "Is it meaningful or useful to claim that a person who boards a bus is promising to pay his fare? If so, would it not be just as meaningful to say that when he descends from the bus and crosses the road he promises to cross with all due care for the safety of other road users?".

[47] Apart from *Fuller* and *Perdue*, one can find the same focus on reliance with *Grant Gilmore*, The death of contract, (Columbus [Ohio] 1974) 88: "We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendants assurances must be recompensed. When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort." On *Gilmore*, one should take note of the criticism by *James Gordley*, 89 Harv. L. Rev. (1975–1976) 452–467. – For similar arguments by contract scepticists in 19th century Germany, see my article, *Albers*, Die *causa* vom *Code Civil* zum BGB (n. 15) 285, 312 f. with note 263.

[48] *Atiyah*, Contracts and Promises (n. 45) 25.

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Institutiones

Digesta

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Aristotle

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Cicero

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Gellius

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Varro

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Code civil

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Code monétaire et financier

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Codice penale

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5. Table of Cases

French

German

Amts– und Landgerichte

Bundesarbeitsgericht

Bundesgerichtshof

Bundesverfassungsgericht

Bundesverwaltungsgericht

Oberlandesgerichte

Oberster Gerichtshof für die Britische Zone

Reichsgericht

Italian

Corte di cassazione

Corti d'appello

Tribunali

Tribunali Amministrativi Regionali

Common Law & Mixed Jurisdictions

European Union

About the Authors

Gregor Albers
Dr. iur., Akademischer Rat auf Zeit am Institut für Römisches Recht und Vergleichende Rechtsgeschichte der Rheinischen Friedrich Wilhelms-Universität, Bonn

Elena Bargelli
Dr., Professore Ordinario di Diritto privato, Università di Pisa

Francesca Bartolini
Dr., Professore Associato di Diritto privato, Università Link Campus, Roma

Kristin Boosfeld
Dr. iur., M. Jur. (Oxon.), Akademische Rätin auf Zeit am Institut für Rechtsgeschichte der Westfälischen Wilhelms-Universität, Münster

Tommaso dalla Massara
Dr., Professore Ordinario di Istituzioni di diritto romano, Università Roma Tre

Horst Ehmann
Dr. iur., emeritierter ordentlicher Professor für Bürgerliches Recht und Arbeitsrecht, Universität Trier

Samuel Fulli-Lemaire
Professeur de droit privé à l'Université de Strasbourg

Andrea Maria Garofalo
Dr., Ricercatore a t.d. di Diritto privato, Università di Trento

Thomas Genicon
Professeur de droit privé à l'Université Paris-Panthéon Assas

Elena Giannozzi
Professeur d'Histoire du droit à l'Université de Reims Champagne-Ardenne

Manuel Grasso
Profesor de Derecho Romano, Universidad de los Andes, Santiago, Chile. Dottorato di ricerca en «Sistema giuridico romanistico, unificazione del diritto e diritto dell'integrazione», Università degli Studi di Roma 'Tor Vergata' (Italia)

Birke Häcker
Dr., M. A. (Oxon.). Professor of Comparative Law and Director of the Institute of European and Comparative Law, University of Oxford

Klaus Kowalski
Dr. iur., Rechtsanwalt in Brüssel

Francesco Mezzanotte
Dr., Professore Associato di Diritto privato, Università Roma Tre

Francesco Paolo Patti
Dr., LL. M. (Münster), Professore Associato di Diritto privato, Università Bocconi, Milano

Arnaud Paturet
Chargé de recherches en sociologie et sciences du droit au CNRS

Dorothée Perrouin-Verbe
Enseignante contractuelle à CY Cergy Paris Université

Martin Josef Schermaier
Dr. iur., Professor und Direktor des Instituts für Römisches Recht und Vergleichende Rechtsgeschichte an der Rheinischen Friedrich Wilhelms-Universität, Bonn

Lilly Schröder
stud. iur., Rheinische Friedrich Wilhelms-Universität, Bonn

Ralf Treibmann
Diplôme d'études approfondies (Paris X), Bonn

Simon Whittaker
Professor of European Comparative Law, University of Oxford, Fellow and Tutor in Law, St. John's College, Oxford